IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-572

DAN B. BUZZARD, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

TABLE OF AUTHORITIES

Cases:

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The Petitioner, Dan B. Buzzard, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on August 23, 1976, affirming his conviction for violation of Section 1 of the Sherman Antitrust Act.

A.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the United States District Court for the District of New Mexico.

B.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) Judgment of the Court of Appeals affirming Petitioner's conviction was entered on August 23, 1976.

(ii) Petitioner's petition for rehearing *en banc* was denied by order of the Court of Appeals entered on September 27, 1976, which appears in the Appendix hereto (Appendix, *infra* at p. 11a).

(iii) Jurisdiction to review Petitioner's claims by writ of certiorari is conferred upon this Court by the provisions of 28 U.S.C. §1254, which provides in pertinent part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods; (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

C.

QUESTIONS PRESENTED FOR REVIEW

1. Where in a criminal trial there is evidence indicating intentional erasure of exculpatory conversation from a tape recording offered as the primary prosecution evidence, does the court commit reversible error: (a) by admitting the tape in evidence over timely objection directed to its authenticity, accuracy and completeness; or (b) by refusing to give Defendant's proffered instruction that the jury should scrutinize the recording with care in view of conflicting evidence as to its authenticity, accuracy and completeness?

2. Are the due process rights of a criminal Defendant violated if there is evidence of intentional erasure, during

police custody, of exculpatory material from a tape recording constituting the primary evidence resulting in conviction?

3. Do federal courts have subject matter jurisdiction of an indictment alleging violation of Section 1 of the Sherman Act, 15 U.S.C. §1, where the evidence establishes a conspiracy of local retailers from a single county, and where the affected goods were all purchased from in-state wholesalers and had remained in the wholesalers' warehouse inventories for 2 weeks to 3 months before sale to the retailers?

D.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, at page 40 of the official 1952 edition of the United States Constitution, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Sherman Act, 15 U.S.C. §1, as it existed at the time of the alleged offense and the indictment, may be found at pages 2978-2979, Volume Three of the official 1970 edition of the United States Code, and provided:

> Every contract, combination in the form of trust or

otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, that nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, that the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 46-10-9D of the New Mexico Liquor Control Act may be found at page 297, Volume 7 (1966 Repl.) of the official edition, and provides:

Offenses by retailers. — It shall be a violation of this act for any retailer:

D. To sell, possess for the purpose of sale, or to have, possess or keep on his licensed premises, liquors not contained in the unopened, original, immediate container as packed and filled by the manufacturer, rectifier or bottler thereof; or to buy or receive any alcoholic liquor for the purpose of, or with the intent of, reselling the same, from any person other than a duly licensed New Mexico wholesaler or winer.

Art. 666-8 of the Texas Liquor Control Act may be found on page 99 of the Penal Auxiliary Laws 1976 Pamphlet, Vernons Ann. P.C., and provides:

It shall be unlawful for military personnel stationed in Texas or any resident of the State of Texas to import into this state more than one (1) quart of liquor unless he is the holder of a permit as provided in Section 4(a) hereof. It shall further be unlawful for any nonresident of the State of Texas to import into this state more than one (1) gallon of liquor. In addition to the penalties set out in Section 41 of this Act, any person violating any provision of this section shall forfeit the liquor so illegally imported to the Texas Liquor Control Board. It is further provided that any person importing any liquor into this state under the provisions of this section shall pay the state tax thereon as levied in Section 21, Article I, Texas Liquor Control Act, and affix thereto the required State Tax Stamps.

E.

STATEMENT OF THE CASE

This case arose from an alleged price fixing agreement among 13 members of the Clovis, New Mexico Retail Liquor Dealers Trade Association (hereinafter "Association"), who allegedly had successfully maintained uniform retail liquor prices in Clovis during the 1967 - 1972 period. There was no evidence of participation in the alleged conspiracy

by retailers or wholesalers from other New Mexico communities, and no evidence of Petitioner's involvement prior to January of 1973. Petitioner was not a liquor retailer and had no interest in any liquor establishment.

In late 1972 a discount liquor store known as Riley's Switch was opened in Clovis by Dr. James Messer and James Avery, who began selling at prices below those agreed upon by Association members. On several occasions in late 1972 and early 1973 Association members met with Avery and Messer and attempted to pressure them into joining the Association and observing the Association's pricing agreement. Petitioner took no part in these meetings.

Following an unsuccessful attempt by the Association to secure Avery's and Messer's adherence to the pricing agreement at a January 5, 1973 meeting in the Clovis Hotel, at which Petitioner was not present, Petitioner was visited by three Association members at his law offices on January 9, 1973. Petitioner was advised that the Association would engage in retaliatory price cutting unless Avery and Messer complied with Association pricing. Petitioner was requested to contact Avery and Messer on behalf of the Association to seek their compliance.

On the evening of January 9, 1973, Petitioner made a telephone call to Avery. Avery thereafter called Messer and suggested Messer call Petitioner and tape the call, with equipment which had been provided by local police and FBI agents. Messer returned the call and, without Petitioner's knowledge, surreptitiously recorded the conversation. This recording constituted Respondent's primary evidence against Petitioner, as noted by the Court of Appeals (Appendix, *infra* at p. 2a).

In the recorded conversation, Messer initially requested

that Petitioner represent Messer and Avery in another matter, and then drew Petitioner into a discussion of the liquor pricing issue. The conversation was described as ambiguous by government counsel during Petitioner's second trial. Petitioner testified that he did not make the call for the purpose of seeking Messer's agreement to raise or fix his prices.

As noted in part by the Court of Appeals (Appendix, *infra* at pp. 5a, 6a) there was trial evidence indicating that a 3 minute portion of the tape recording, including exculpatory matter, was intentionally deleted while the tape was in the custody of police officials, including evidence:

1. That the tape played at trial was 26 minutes long, although Messer's notations on the tape itself indicated that the conversation lasted 29 minutes;

2. That the missing portion included exculpatory conversation in which Petitioner explicitly expressed his repugnance to any pressure on Avery and Messer to fix prices;

3. That two law enforcement officials with access to the tape had expressed strong personal enmity toward Petitioner;

4. That a portion of the recording could easily have been erased by a simple process using a reel-to-reel tape recorder, notwithstanding the fact that the tabs in the tape cassette had been punched out;[1]

5. That any erasure *must have been intentional*, because

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[1] Petitioner's tape recording expert explained the commonly used process at trial. After placing scotch tape over the tab holes to allow re-recording, a reel-to-reel copy of the cassette is made. The portion of the conversation to be deleted is spliced out of the copy, and the altered copy is re-recorded on the cassette, after erasure of the original cassette recording. The single splice on the copy is ordinarily not audible on the altered cassette, and there is no splice on the cassette tape.

the tabs in the tape cassette had been punched out when the police took custody of the recording on January 10, 1973;

6. That at least one reel-to-reel copy of the tape was in fact made by officials at the Clovis Police Department; and

7. That numerous persons had access to the tape during a several month period. Respondent failed to demonstrate a continuous chain of custody, or account for all persons with access to the tape. A Clovis police lieutenant called by Respondent admitted on cross examination that care for the custody of the tape had not been up to the usual standards of the Clovis Police Department.

While there was conflicting evidence as to point 2, the evidence summarized in points 1 and 3-7 was uncontroverted.

The tape recording was admitted by the trial court over Petitioner's timely objection on grounds of evidence indicating that exculpatory material had been intentionally deleted, and evidence of a defective chain of custody. Petitioner's pretrial motion for independent electronic testing of the recording had been denied.

As noted by the Court of Appeals (Appendix, *infra* at p. 5a) the trial court refused to give Petitioner's proffered instruction that the jury should scrutinize the recording with care because of conflicting evidence regarding its authenticity and completeness, instead instructing that the tape should be considered "just as you would any other testimony or evidence put before you."

Regarding the Sherman Act jurisdictional issue of restraint on interstate commerce, trial evidence indicated:

1. All alcoholic beverages sold by the Clovis retailers were purchased from New Mexico wholesalers, since direct

purchases from out of state manufacturers are illegal under New Mexico law. See § 46-10-9D New Mex. Stats. Ann. (1953 Comp.).

2. The alcoholic beverages sold by Clovis retailers spent periods of 2 weeks to 3 months in New Mexico wholesalers' warehouse inventories before shipment to Clovis.

3. Only 13 of more than 500 New Mexico retailers were involved in the alleged conspiracy, and no wholesalers were involved.

4. Although some sales were made to Texans visiting the Clovis retailers, these Texans were involved in illegal importation under Texas law as explained hereinbelow. *See* Texas Liquor Control Act, Art. 666-8, Vernon's Ann. P.C.

F.

REASONS FOR GRANTING THE WRIT

1. *The decision below conflicts with pronouncements of other Courts of Appeals as to the requisite foundation for admission of a tape recording in a criminal case.*

Notwithstanding evidence indicating deletion of exculpatory material from the tape recording constituting the primary evidence against Petitioner, and evidence of a defective chain of custody, as summarized above, the Court of Appeals declined to follow (or even discuss) the rules accepted by other Circuit Courts of Appeals as to the proper foundation for admission of a tape recording in evidence.

It is generally accepted in the other Circuit Courts of Appeals that the requisite foundation for the admission of a tape recording, particularly in a criminal case, includes a clear and convincing showing of authenticity and accuracy.

United States v. Knohl, 379 F.2d 427, 440 (2nd Cir. 1967), *cert. denied*, 389 U.S. 973 (1967). A proper foundation for the admission of a tape recording includes a showing of the following:

> (1) That the recording device was capable of taking the conversation offered in evidence.
>
> (2) That the operator of the device was competent to operate it.
>
> (3) *That the recording is authentic and correct.*
>
> (4) *That changes, additions or deletions have not been made in the recording.*
>
> (5) *That the recording has been preserved in a manner that is shown to the Court.*
>
> (6) That the speakers are identified.
>
> (7) That the conversation elicited was made voluntarily and in good faith without any kind of inducement.

United States v. McKeever, 169 F.Supp. 426, 430 (S.D.N.Y. 1958); *United States v. Starks*, 515 F.2d 112, 121 n. 11 (3rd Cir. 1975) (following *McKeever*); *McKeeman v. Commercial Credit Equipment Corporation*, 320 F.Supp. 938, 945 (D.Nev. 1970); *United States v. McMillan*, 508 F.2d 101, 104 (8th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975). Reasonably strict adherence to these requirements has generally been required. *Annot.* 58 ALR 2d 1024, 1032 (1958). These requirements have been based upon a recognition that tape recordings are readily susceptible to alteration, and that recordings often have a persuasive and dramatic impact upon a jury. *United States v. Knohl, supra*, 379 F.2d at 440.

Furthermore, in *United States v. Starks, supra*, the Court held that any presumption of regularity attaching to the handling of evidence within the control of public officials is overcome when a colorable attack is made as to the tape's

authenticity and accuracy, whereupon the burden again shifts to the government to demonstrate the accuracy and completeness of the tape by clear and convincing evidence:

> The presumption of regularity, if it can be dignified as a rule, does not serve as a substitute for evidence when authenticity is, as here, challenged on not insubstantial grounds. At best, it may relieve the government of the necessity for offering proof of custody *until the integrity of the evidence has been put in issue*. *United States v. Starks, supra*, 515 F.2d at 122. (Emphasis added)

Petitioner's case is stronger than that of the Defendant in *United States v. Starks*. In *Starks*, although there was a question as to which tape was the original and which a copy, there was no affirmative evidence that a portion of the original recording may have been deleted, as in Petitioner's case. *Id.*, 515 F.2d at 121.

Here there is strong evidence from which one can infer that a significant, exculpatory portion of the tape, approximately 3 minutes in duration, was intentionally erased while it was in the careless custody of Clovis law enforcement officials. Several items of evidence, including the tape itself, support the conclusion that the trial version had been tampered with and is incomplete, as summarized above.

Yet the Court of Appeals failed to apply, or even discuss, the above-cited authorities cited to it by Petitioner (Appendix, *infra* at pp. 4a-5a). Instead the Court relied upon its decision in *United States v. Hodges*, 480 F.2d 229 (10th Cir. 1973), dealing with the trial court's discretion regarding admission of a tape recording which is partially inaudible due to technical problems encountered during recording. The Court erred in declining to accept Petitioner's contention that the rule stated in *Hodges* is not controlling where there is evidence indicating the intentional erasure of

exculpatory matter, since such evidence puts the *authenticity* of the recording in issue. Accordingly, Petitioner submits that the decision of the Court of Appeals is, at least in principle, in conflict with decisions of other Courts of Appeals. Because several items of evidence, including notations on the tape itself, indicate that exculpatory matter was deleted, Petitioner submits that this is an appropriate case in which this Court should offer guidance to the Courts of Appeals regarding the requirements for admission of tape recordings in criminal trials.

2. ***The decision below conflicts with the rule stated by the Second Circuit Court of Appeals as to the jury instruction issue.***

The Court of Appeals for the Second Circuit has stated that where the trial court accepts a tape recording as authentic and accurate but the evidence is conflicting on these points, it must caution the jury to scrutinize the recording with care. *United States v. Knohl,* 379 F.2d 427, 440 (2nd Cir. 1967), *cert. denied,* 389 U.S. 973 (1967).

Yet the Court of Appeals declined to find error in the trial court's refusal to give Petitioner's proffered instruction based upon *United States v. Knohl, supra.* (Appendix, *infra* at pp. 5a-6a). The Court of Appeals reached its conclusion on the basis of a general instruction making no reference to tape recordings and couched in terms of the credibility of trial witnesses (Appendix, *infra* at pp. 5a-6a). This instruction makes no reference to the possibility that the record of a conversation has been subsequently altered, and gives no guidance for the jury's consideration of such a possibility.

More importantly, in an instruction directed specifically to tape recordings the trial court told the jury to "consider

the tape recordings just as you would any other testimony or evidence put before you." (Appendix, *infra* p. 5a). Thus the court in effect told the jury to *disregard* any evidence indicating that someone had tampered with the recording, thereby aggravating the effect of refusal to give Petitioner's proffered instruction.

Accordingly Petitioner submits that the Court of Appeals' resolution of the jury instruction issue conflicts, at least in principle, with the opinion of the Court of Appeals for the Second Circuit in *United States v. Knohl, supra.*

3. ***The decision below resolves a federal question in a manner conflicting with the decision of this Court in Brady v. Maryland, 373 U.S. 83 (1963).***

The Court of Appeals declined to follow or discuss Petitioner's argument that since there was evidence indicating that exculpatory material was erased intentionally while the tape was in the possession of law enforcement officials the due process rights of Petitioner were thereby violated. *Brady v. Maryland,* 373 U.S. 83 (1963). Even where the loss of such exculpatory material results from negligence rather than intentional deletion, dismissal of the charges may be required under the holding of *Brady. U.S. v. Bryant,* 439 F.2d 642, 652-653 (D.C. Cir. 1971). In *U.S. v. Bryant* the government had failed to preserve a tape recording of a key conversation between the defendant and a government agent. The Court of Appeals remanded to the district court for a determination as to whether the degree of negligence or bad faith and the importance of the evidence lost were such that the holding of *Brady* required dismissal of the indictment. *Id.,* 439 F.2d at 653.

The opinion of the Court of Appeals fails to discuss

these authorities cited to the court by Petitioner. (Appendix, *infra* at pp. 4a-6a). Petitioner respectfully submits that the Court of Appeals failed to deal with or decide an important federal question in a manner consistent with the decision of this Court.

4. *The decision below incorrectly resolves an important federal question of subject matter jurisdiction under the Sherman Act, which question should be settled by this Court.*

The Court of Appeals affirmed the trial court's refusal to dismiss the indictment and charge for Respondent's failure to prove subject matter jurisdiction. (Appendix, *infra* pp. 8a-9a.) The Court of Appeals' decision, on the facts before it, is not only incorrect but in effect holds that the Sherman Act is applicable to even a local conspiracy among a few retailers, where all the goods involved were purchased from in-state wholesalers and where, contrary to a statement of the Court of Appeals (Appendix, *infra* p. 8a), the goods had left the flow of interstate commerce at wholesale warehouses. The decision represents an expansion of Sherman Act jurisdiction, and should be reviewed by this Court.

The facts of Petitioner's case regarding the interstate commerce jurisdictional issue, summarized above, are quite different from the facts in *Hospital Building Company v. Trustees of the Rex Hospital*, 44 U.S.L.W. 4683 (1976). In *Rex Hospital* 80% of the Petitioner's supplies were purchased directly from out-of-state sellers, and Petitioner's planned operations involved several other direct financial transactions with out-of-state firms. 44 U.S.L.W. at 4684. Moreover, the Court in *Rex Hospital* emphasized that it relied in part upon the rule that dismissals of antitrust cases in the early pretrial stage should be granted only sparingly,

which rule has no application to Petitioner's case. 44 U.S. L.W. at 4685.

The Federal courts do not have jurisdiction of an indictment alleging violation of Sherman Act §1, 15 U.S.C.A. §1, unless it is proven that the restraint either acted upon transactions within the flow of interstate commerce [hereinafter termed the "in-commerce" jurisdiction theory] or acted upon transactions which, although wholly intrastate or local, nonetheless substantially affect the flow of interstate commerce [hereinafter termed the "affecting commerce" jurisdiction theory]. *Rex Hospital, supra; United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); *Klors, Inc. v. Broadway Hale Stores, Inc.*, 359 U.S. 207, 211 (1959); 16 VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION §5.01[1] at 5-11 (1969) [hereinafter cited "VON KALINOWSKI"]. Respondent failed to establish subject matter jurisdiction under either of the commerce theories.

The indictment alleged restraint of interstate commerce under the in-commerce theory, stating that "the defendants are engaged in interstate commerce." (Appendix, *infra*, n. 3, p. 8a). The indictment did not specifically allege jurisdiction under the affecting commerce theory, although it did make reference to sales to Texans, which Petitioner contends cannot establish jurisdiction under the affecting commerce theory for reasons set forth hereinbelow.

The indictment alleged a purely local conspiracy, with purely local aims and effects. It is alleged that "the defendant corporations and proprietorships sell alcoholic beverages by the bottle and/or by the drink in Clovis, New Mexico" (Appendix, *infra*, n. 3, p. 8a). The 13 Clovis liquor licenses involved in the alleged conspiracy constituted only

a very small percentage of New Mexico liquor retailers. One wholesaler supplying Clovis retailers testified that it maintained approximately 500 retail accounts in its Albuquerque branch alone. (The Albuquerque branch covered only Clovis, Gallup, Grants, Farmington and Albuquerque).

The products in question had physically ceased their interstate journey before shipment to the Clovis retailers, having come to rest for weeks or months upon warehouse shelves. Wholesalers testified that typical warehouse times-on-shelf were 45 to 60 days for the average whiskey brand, 90 to 120 days for scotch, 3 to 4 weeks for Importer's vodka, a high sales volume item, 52 to 73 days for Schenley domestic whiskey, one to 3 months for wine and 2 to 4 weeks for beer.

In-Commerce Jurisdiction

To establish jurisdiction under the in-commerce theory it must be shown that the alleged restraint acts directly upon interstate transactions of the affected businesses. *United States v. Yellow Cab Co.*, 332 U.S. 218, 230-234 (1947); 16 VON KALINOWSKI §5.01[1] at 5-12 n. 15, citing cases. The issue here is whether the alcoholic beverages, purchased exclusively from in-state wholesalers, had left the flow of interstate commerce before arriving at the Clovis retail establishments allegedly involved in the price-fixing conspiracy.

As a general rule goods leave the flow of interstate commerce, for Sherman Act purposes, upon arrival at the warehouse of an in-state wholesaler. *Burke v. Ford*, 377 F.2d 901, 903-906 (10th Cir. 19 , *rev'd on other grounds*, 389 U.S. 320 (1968). Although this Court reversed the decision of the Court of Appeals in *Burke* on the basis that the facts of that case established jurisdiction under the affecting commerce theory, the in-commerce theory holding of the

Court of Appeals was left undisturbed, and is generally accepted as valid. Thus a leading text writer extensively cites the Circuit Court opinion in *Burke* in support of the rule that:

> Goods ordered by a wholesaler, distributor, or retailer to be placed in his general inventory leave the stream of commerce at the moment they reach the wholesaler, distributor, or retailer. 16 VON KALINOWSKI §5.02[2] at 5-63 n. 80.

Exceptions to the general rule are recognized where the wholesaler has ordered the goods in question to fill a special order of a retailer, where there is a contract or understanding under which the wholesaler has agreed to fill the needs of a particular retailer, or where the wholesaler has ordered the goods to fill the anticipated needs of a particular retailer. *Burke v. Ford*, 377 F.2d at 903-906; 16 VON KALINOWSKI §5.01[2] at 5-63.

In the instant case the evidence does not support application of any such exception. There is no indication that New Mexico wholesalers gave particular attention to the requirements of only 13 of the state's many retailers in placing their orders with distillers and brewers. Rather, the record indicates that, as in *Burke*, "the wholesalers met the general demand for alcoholic beverages apparently replenishing their inventories when necessary." 377 F.2d at 904. Wholesalers supplying Clovis retailers testified that their orders to manufacturers were determined by their total sales, and that local variations in demand for particular types of beverages tended to cancel out on a statewide basis. The retailers may not make direct purchases from out-of-state distillers or manufacturers, since such direct sales are illegal under New Mexico law. §46-10-9D New Mex. Stats. Ann. (1953 Comp.).

Accordingly Petitioner submits that Respondent's proof failed to establish subject matter jurisdiction under the in-commerce theory stated in the indictment.

Error in Admitting Evidence Beyond the Scope of the Indictment Re Affecting Commerce Jurisdiction

Petitioner objected to the admission of evidence apparently based on the affecting commerce theory including evidence of sales to Texas residents, as being beyond the scope of the indictment.

Since the affecting commerce theory is outside the scope of the indictment the Court committed prejudicial error in the admission of such evidence over objection. *Stirone v. United States*, 361 U.S. 212, 217-218 (1960).

In *Stirone* this Court reversed a conviction under the Hobbs Act, 18 U.S.C. §1951, for interfering with interstate commerce by extortion, because the trial judge admitted evidence on a theory of interstate commerce going beyond the scope of the indictment. The Court held that the admission of such evidence over objection was reversible error. This holding is applicable to the instant case. *See also United States v. Critchley*, 353 F.2d 358, 362 (3rd Cir. 1965), reversing a conviction under the Hobbs Act on the same ground.

Affecting Commerce Jurisdiction Not Shown

Even should this Court conclude that such evidence was properly admitted, Petitioner submits the government failed to establish jurisdiction under the affecting commerce theory.

Here the restraint on interstate commerce which allegedly resulted from the alleged conspiracy is at most an indirect one, being a restraint imposed upon local sales of Clovis retailers — the intrastate operations of local businesses. 16 VON KALINOWSKI §5.01[4] at 5-104 n. 138, citing *Spears Free Clinic and Hospital for Poor Children v. Cleere*, 197 F.2d 125 (10th Cir. 1952) [hereinafter cited "*Spears*"], and other cases. Such an indirect restraint on interstate commerce does not create jurisdiction under the affecting commerce theory unless the effect on interstate commerce is substantial. *Rex Hospital, supra; Spears, supra; United States v. Utah Pharmaceutical Association*, 201 F. Supp. 29 (D. Utah 1962), *appeal dism'd*, 306 F.2d 493 (10th Cir. 1962), *aff'd* 371 U.S. 24 (1962); 16 VON KALINOWSKI §5.01[4] at 5-100 n. 136.

While no precise test of substantiality has evolved, some courts have looked to the proportion of the state's total flow of commerce in a line of goods which is affected by the restraint, and as a rule have held that an indirect restraint on the interstate flow of goods to or from a single business does not have a substantial effect on interstate commerce. *Spears, supra;* 16 VON KALINOWSKI §5.01[4] at 5-106 n. 141. In *Schnapps Shop, Inc. v. Wright & Co.*, 377 F. Supp. 570 (D. Md. 1973), a civil action brought by a liquor retailer against a wholesaler who was the sole Maryland distributor for the products in question, the court held jurisdiction existed but indicated that the relevant consideration was the effect on the total volume of goods moving into the state.

Similarly, in *Burke* this Court found jurisdiction under the affecting commerce theory where the alleged conspiracy involved Oklahoma liquor wholesalers operating on a statewide basis. The court held that "the statewide wholesalers market division inevitably affected interstate commerce."

389 U.S. at 322. In *Car Trade, Inc. v. Ford Dealers Advertising Association of Southern California*, 446 F.2d 289 (9th Cir. 1971), *cert. denied*, 405 U.S. 997 (1972), the Court of Appeals in affirming dismissal of a private antitrust action against an association of 143 southern California automobile dealers specifically distinguished *Burke* on the basis that *Burke* involved a statewide agreement of all liquor wholesalers, the anti-competitive effect of which is "too obvious to require proof." *Id.*, 446 F.2d at 294.

Here only 13 of more than 500 New Mexico retailers were affected. There was no evidence indicating that a significant proportion of liquor moving into the State of New Mexico was affected by the alleged restraint.[2] Indeed, Respondent put on no evidence as to the proportion of the total New Mexico liquor traffic affected by the Clovis situation.

As noted previously, the court admitted various items of evidence pertaining to sales to Texans visiting Clovis retail liquor establishments. Such sales may not be used to establish jurisdiction under the affecting commerce theory, for two reasons. *First*, cases dealing with indirect restraints under the affecting commerce theory indicate that a restraint on local business transactions does not have the required substantial effect on interstate commerce merely because interstate travelers present in the community may be affected. *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); 16 VON KALINOWSKI §5.01[4] at 5-110 n. 144. See also *Hotel Phillips, Inc. v. Journeyman Barbers Union*, 195 F. Supp. 664 (W.D. Mo. 1961), *aff'd* 301 F.2d 443 (8th Cir. 1962). *Secondly*, sales to Texans are wholly intrastate transactions, being completed by the closed sale transaction in Clovis. The fact that the Texans return home with these products may not be used to establish affecting commerce jurisdiction in any case, since such activity involves illegal importation of liquor under Texas law. As Petitioner's counsel pointed out to the trial court, it is illegal under the Texas Liquor Control Act for a Texas resident to import more than one quart of liquor into Texas without a permit authorizing such imports. *See* Texas Liquor Control Act, 666-8, Vernon's Ann. P.C. And there was evidence that sales to Texans exceeded one quart, since one of the retailers testified that his average sale to Texans was for more than $30.00. Liquor illegally imported into a state is not a commodity moving in interstate commerce. *Gordon v. State*, 310 S.W. 2d 328 (Tex. Crim. App. 1956), *aff'd without opinion*, 355 U.S. 369 (1957).

In any case the jury could not reasonably have found jurisdiction under the affecting commerce theory based upon sales to Texans, since the Court instructed the jury to disregard such sales.

For the foregoing reasons Petitioner submits that the Court of Appeals erred in its resolution of important questions of federal law in concluding that the evidence established subject matter jurisdiction under Section 1 of the Sherman Act.

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[2] There was limited testimony that retail price increases tended to cause decreased orders to a particular manufacturer, but this was not tied to Clovis retailers or to the times involved herein.

F. CONCLUSION

For all the above reasons Petitioner submits that the decision of the Court of Appeals is contrary to rules of law stated by other Circuit Courts of Appeals, and by this Court. Petitioner's claims involve important federal questions, and should be reviewed by this Court through the grant of a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Filed Aug. 23, 1976

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 75-1367
	)	(74-273 CR)
DAN B. BUZZARD	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Marshall G. Martin (Robert W. Harris of Poole, Tinnin, Danfelser & Martin with him on the brief) for Appellant.

Michael J. Pugh and Robert B. Nicholson (Thomas E. Kauper Assistant Attorney General, with them on the brief) for Appellee.

Before LEWIS, Chief Judge; SETH and BARRETT, Circuit Judges.

LEWIS, Chief Judge.

Dan B. Buzzard appeals the judgment and order of the district court for the District of New Mexico confirming a jury verdict finding him guilty of violating section 1 of the Sherman Antitrust Act. Buzzard's conviction arose out of his alleged conspiracy with members of the Retail Liquor

Dealers Trade Association of Clovis (Association) to fix the retail prices of liquor sold in Clovis, New Mexico.

James Messer and James Avery began operating a discount package store known as Riley's Switch after acquiring a liquor license for Clovis, New Mexico. Because Riley's Switch was selling beer and liquors at prices below those of other liquor stores in Clovis, the Association allegedly attempted illegally to force or persuade Messer and Avery to increase their prices. Messer and Avery were first visited by Association members and pressured to raise their prices to the levels agreed upon by the Association. On January 5, 1973, Messer and Avery, surreptitiously wearing voice transmitters monitored by the police, attended a meeting of the Association at the Clovis Hotel. At the meeting the Association members allegedly discussed the price-fixing arrangement, explained the markups and again pressed Messer and Avery to join the conspiracy to fix prices. After the meeting the local police, with Messer's consent, placed a recording device on his telephone.

On January 9, 1973, three members of the Association visited Buzzard in his law offices. They advised him that the Association had just had a meeting and all the members agreed to engage in retaliatory price cutting against Messer and Avery if they did not go along with the Association. The three requested Buzzard to represent the Association in contacting Messer and Avery to seek their compliance. That evening Buzzard called Avery to inform him of the discussions with members of the Association. Avery said he would have to talk to Messer. Avery then called Messer and suggested that Messer return the call to Buzzard and record it. The resulting tape recording of the Buzzard-Messer conversation was the primary evidence against Buzzard in his trial for violation of the antitrust laws.[1]

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[1] Significant portions of the Buzzard-Messer conversation bearing on Buzzard's participation in the conspiracy follow:

> Buzzard speaking:
> Yeah, all of them met today at noon. And then the three men came to me as I told Mr. Avery; Mr. Wolf, Mr. Pettigrew, and Mr. Goodman and said,

The tape recording of the Buzzard-Messer telephone call was given to the Clovis Police Department the morning after the call. Subsequently, members of the Association and Buzzard were indicted for violations of section 1 of the Sherman Antitrust Act. Buzzard's first jury trial terminated when the trial court granted his motion for a mistrial because of Government attorney misconduct. Buzzard's second jury trial resulted in a verdict of guilty, which was confirmed by the trial court's judgment.

Buzzard appeals alleging the trial court erred in admitting the Buzzard-Messer recording, in instructing the

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[1] (Cont.)

> say we can't stand this cutting deal. It's bad for all of us and we can't do anything but compete that and this — then they went through all these computations that they gave to you at the Hotel Clovis.
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> * * * *
>
> Buzzard speaking:
> [T]hey can put up a hell of an argument that their 40 and 45 [markup] is legitimately the way to operate. . . . And I don't want a price war and I am controlling it up to this point I can tell you that. . . .
>
> * * * *
>
> Buzzard speaking:
> Let me ask you this. I had this proposal from Kit before I talked with the three at 1:30 and he said . . . uh, it's alright with me for them to go ahead with their 30% markup, until they get in their new building.
>
> * * * *
>
> Messer speaking:
> And they want us to come up to their prices.
>
> Buzzard speaking:
> Yeah, they'd like that. They think that's the best interest of you and they think it's the best interest of them.
>
> * * * *
>
> Messer speaking:
> Next point, uh, no one tells Dan Buzzard or Richard Snell how much they're going to charge for a divorce case. Uh —
>
> Buzzard speaking:
> Well, they have a minimum fee schedule, Doctor, probably violates —
>
> Messer speaking:
> We do?
>
> Buzzard speaking:
> We do, Mr. Snell and I and probably every other lawyer in town probably violates the anti-trust laws.
>
> * * * *

jury regarding the tape recording, and in denying the motion to dismiss because of double jeopardy. Allegedly the court also erred in denying the motion for acquittal because of variance between the bill of particulars and the Government's proof at trial, failure to establish subject matter jurisdiction, and insufficient evidence.

Buzzard contends that the court erred in permitting the taped Buzzard-Messer conversation to be admitted as evidence. The admissibility of a taped conversation rests within the sound discretion of the trial judge. United States v. Hodges, 10 Cir., 480 F_2 229, 233-34; United States v. Knohl, 2 Cir., 379 F_2 427, 440, *cert. denied*, 389 U.S. 973. The district court prior to admitting the tape allowed extensive testimony and briefing regarding its authenticity and completeness. At trial Buzzard presented testimony proving the theoretical electronic possibility of erasure, that certain police officials with keys to where the tape was placed may have held an animus toward Buzzard and that the tape was only 26 minutes long despite Messer's notation on the tape that it lasted 29 minutes. Buzzard's contention is that the tape was intentionally manipulated to effect the erasure of a key 3-minute portion which included exculpatory statements by him.

We hold the trial court to be within its discretion in determining there was sufficient evidence to admit the tape. Messer testified the recording was complete. Lt. Chandler, who retrieved the tape from Messer and listened to it the day after its recording, also testified that the tape, as presented at trial, was complete. We note that Buzzard was allowed to present in detail his arguments to the jury regarding the authenticity and completeness of the tape.

Buzzard alleges the trial court erred in failing to give his proffered instruction that the jury should scrutinize the tape with care because of the conflicting evidence regarding its authenticity and completeness. The court merely instructed the jury that you "should consider the tape recordings just as you would any other testimony or evidence put before you" and "not give it any value weight because it is a tape recording." The trial court elsewhere instructed the jury as follows:

> At times, throughout the trial, I have been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such ruling and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, I do not determine what weight should be given such evidence; nor do I pass on the credibility of the witness.

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1 (Cont.)

Buzzard speaking:
I'd like to be able to say, well, uh, I'd like for you to say let's figure on it. Let me talk to Crawford and uh, even Johnnie Mack and see if I could get a consensus with these gentlemen. That's all I want.

* * * *

Buzzard speaking:
I'm just going to visit with you, because perhaps, well, here's the deal. I told them not to be popping off about, uh, business, because I figured it would violate the anti-trust laws, but if anybody was going to do the popping off, I would.

Messer speaking:
Uh, huh.

Buzzard speaking:
See, cause I don't want them hauled into Grand Juries, and if I am, why, uh, that's my business.

Messer speaking:
Uh, huh.

Buzzard speaking:
And my problem, but I don't want my clients, so that's probably why I'm doing the talking. . . .

* * * *

Messer speaking:
But in all fairness to them I won't come — The main thing that Crawford wants, Crawford has bugged me several times, is for me to come up to a dollar for we, Avery and Messer, to come up to a $1.50 on the beer and uh, we won't do it and I think in all fairness, you ought to tell them that.

Buzzard speaking:
Alright, I'll tell them that. While you're at it, do you want it forever or do you want it while you're in the garage. Why don't you give me a little lee-way there?

> You are the sole judges of the credibility of all of the witnesses and the weight their testimony deserves. You should carefully scrutinize every matter in evidence which tends to indicate whether a witness is worthy of belief.

The record also reflects that with the exception of an alleged three-minute gap, there was no evidence throwing doubt on the tape's authenticity or completeness. In the context of this lengthy trial presentation regarding the possibility of a three-minute gap, we hold the instructions were not erroneous when considered as a whole. Buzzard's proffered instruction, while it was directed specifically at the tape, does not differ from the standard the court instructed the jury to utilize concerning the credibility or weight to be assigned all evidence and testimony.

Buzzard argues that this trial should have been barred under double jeopardy principles because prosecutorial error caused an earlier trial to result in a mistrial. Buzzard's motion for mistrial was granted after Government counsel asked Avery two questions:

> Q. Now, just one more question, I hope, Mr. Avery, Did you subsequently learn that these sales to minors, that you had been set up for these sales to minors by members of the Clovis Retail Liquor Association?
>
> A. Yes, Mr. Goodman informed me that it was a form of entrapment, in which he had participated, that he caused it, he said.
>
> Q. Now, is that the same Mr. Goodman that Mr. Buzzard had been representing?
>
> A. Yes.

After the trial court granted his motion for a mistrial, Buzzard moved to dismiss the indictment on double jeopardy grounds. The trial court in denying that motion discussed the nature of the prosecutorial error:

> The prosecution had no evidence to tie Buzzard to this incident. The question was highly improper. The incident was aggravated by previous prosecutorial suggestive or leading questions. The prosecutor's error here was caused by overzealousness and inexperience in trial. It was substantially accidental and was not intended to inflame the jury against the accused. This in my opinion, falls short of the type of overreaching that might bar retrial.

In United States v. Jorn, the Supreme Court stated the applicable rule that

> where circumstances develop not attributable to *prosecutorial or judicial overreaching*, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by *prosecutorial or judicial error*.

400 U.S. 470, 485 (footnote omitted, emphasis added). A footnote to this rule, referring to United States v. Tateo, 377 U.S. 463, 468 n.3, further clarifies what the Court felt should constitute a bar to reprosecution:

> Conversely, where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred.

400 U.S. 470, 485 n.12. In this case the trial court expressly found the prosecutorial error leading to mistrial, accidental and unintentional. Under these circumstances we hold there was no bar to reprosecution.

Buzzard alleges the court erred in failing to grant his motion for acquittal because of variance between the Government's proof at trial and the bill of particulars. Having carefully read the bill of particulars pertaining to Buzzard, this court finds minimal variance between the Government's proof at trial and the bill. We hold no material prejudice resulted from such variance. We note that "variance be-

tween the proof and the bill of particulars is not grounds for reversal unless the appellant is prejudiced by the variance." United States v. Glaze, 2 Cir., 313 F_2 757, 759 (citing United States v. Burgos, 2 Cir., 269 F_2 763, 767-68, *cert. denied*, 362 U.S. 942).

Buzzard also urges the court erred in failing to grant his motion of acquittal because the Government failed to establish the court's subject matter jurisdiction by showing a restraint of interstate commerce. We are satisfied from the record that the impact of the conspiracy upon interstate commerce has been adequately proved. This is not a "warehouse case" where the subject matter completes its interstate nature by coming to rest in warehouses within the state. The flow of liquor here considered is directed and determined by retailers, wholesalers and manufacturers' representatives acting in close conjunction each with the other. Clovis is a border city serving customers from adjoining states in not inconsiderable quantities.[2]

It is also urged that the court erred in allowing evidence on this issue beyond the scope of the indictment. Buzzard alleges the indictment only charges the conspiracy with acting upon transactions within the flow of interstate commerce,[3] and that therefore, the government's proof relating

[2] See note 3 *infra*.

[3] The indictment's charge as to the character and substance of interstate commerce was that:

> The defendant corporations and proprietorships sell alcoholic beverages by the bottle and/or by the drink in Clovis, New Mexico. Virtually all alcoholic beverages sold by these companies are imported from outside of the State of New Mexico by wholesalers. These wholesalers receive shipments of liquor, beer, and wine from such states as Kentucky, Illinois, Tennessee, Colorado, California, Texas, and New York. Distribution involves a rapid turnover of product and distributor inventories are based on demands of the market. Sales representatives of distillers and brewers work in conjunction with wholesale salesmen in servicing the retail trade. The defendants are engaged in interstate commerce.
>
> Clovis, New Mexico is the only city in Curry and Roosevelt Counties, New Mexico and adjoining counties in Texas in which alcoholic products may be sold. A substantial number of customers are attracted from these dry counties of Texas into Clovis for the sale of alcoholic beverages.
>
> In 1972, alcoholic beverages having a wholesale value of $1,833,000 were sold to Clovis alcoholic beverage retailers. It is estimated that sale by Clovis alcoholic beverage retailers exceeded $3 million in 1972.

to the conspiracy's effect on interstate commerce should have been excluded.

This court, considering the charge as a whole, is not persuaded that it would limit the Government to proving the conspiracy acted upon transactions in the flow of interstate commerce. The Government could properly introduce evidence relating to the conspiracy's effect upon interstate commerce. In judging the sufficiency of an indictment this court.

> views the entire document to ascertain whether the offense is charged with sufficient clarity so as to safeguard two constitutional guarantees: the Sixth Amendment right to be informed of the nature and cause of the accusation in order to prepare a defense; and the Fifth Amendment protection against twice being placed in jeopardy for the identical offense.

United States v. Wilshire Oil Co., 10 Cir., 327 F_2 969, 972, *cert. denied*, 400 U.S. 829 (footnotes omitted). Buzzard was adequately informed of the nature of the charge and is sufficiently protected from the possibility of double jeopardy.

Buzzard also argues the court erred in denying his motion for acquittal because of insufficient evidence that he joined the price fixing conspiracy. This appellate court is required, in reviewing the sufficiency of evidence to sustain a verdict of guilty, to consider all the evidence in the light most favorable to the prosecution. United States v. Freeman, 10 Cir. 514 F_2 1184, 1187; United States v. Swallow, 10 Cir., 511 F_2 514, 517, *cert. denied*, 423 U.S. 845. We hold the evidence so considered was sufficient to sustain the guilty verdict and the trial court did not err in confirming that judgment.

It is also alleged that the trial court erred in allowing repetitive questions which wore down and badgered Buzzard into making prejudicial admissions. Such trial court rulings will be disturbed by this court on appeal only if they are

clearly erroneous and only then if the error deprived the defendant of a substantial right. Jennings v. United States, 10 Cir. 364 F_2 513, 515, *cert. denied*, 385 U.S. 1030. This ruling is not clearly erroneous.

Affirmed.

SEPTEMBER TERM - September 27, 1976

Before The Honorable David T. Lewis, Chief Judge,
The Honorable Delmas C. Hill,
The Honorable Oliver Seth,
The Honorable William J. Holloway, Jr.,
The Honorable Robert H. McWilliams,
The Honorable James E. Barrett and
The Honorable William E. Doyle, Circuit Judges

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	No. 75-1367
	)	
DAN B. BUZZARD,	)	
	)	
Defendant-Appellant.	)	

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by Chief Judge Lewis and Circuit Judges Seth and Barrett to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk

By Linda O. Hall
Deputy Clerk